IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 223

TENNESSEE GAS TRANSMISSION COMPANY — Appellant

vs.

MISSISSIPPI STATE TAX COMMISSION — Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal in this case be dismissed and that the final judgment of the Supreme Court of Mississippi be affirmed, on the grounds that this cause does not present a substantial federal question and the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

STATEMENT OF FACTS AND ISSUES OF APPEAL

This cause is an appeal from an additional assessment of franchise tax under the provisions of *Section* 9319, *Mississippi Code of* 1942, Recompiled, as amended

by *Chapter* 412, *Laws of Mississippi Legislature of* 1956, for the years 1956 and 1957.

Appellant, a Deleware corporation and its predecessor a Tennessee corporation have been qualified to do business in the State of Mississippi since 1943. It owned and operated through the State of Mississippi natural gas transmission lines through which it transmitted natural gas gathered in the States of Texas and Louisiana to northern states.

During the years involved in this suit appellant owned in the State of Mississippi 925 miles of pipe line; four compressor stations, having a total of approximately 85,610 horse power; forty-five automobiles, dwelling houses on its compression station property, which houses were used by its maintenance and operating employees; and a partial interest in thirteen oil wells, none of which it operated.

Appellant made no direct sales of gas in the State of Mississippi for the tax years here involved, but did make some wholesale deliveries.

Power used to operate appellant's gas transmission compressor stations was generated from gas taken from appellant's gas transmission lines at its pumping stations in Mississippi. Also, appellant has invoked the right of eminent domain as granted by the statutes of Mississippi on several occasions.

Prior to the 1956 amendment the Corporate Franchise Tax Statutes provided a formula for the computation of the tax composed of the following factors:

Section 9319, *Mississippi Code of* 1942, Recompiled:

". . . the ratio which the real estate and tangible personal property owned or used in this state and

the gross receipts from business carried on in this State bears to the total real estate, tangible personal property, and gross receipts wherever located and from wherever received. . . ."

The 1956 Legislature of Mississippi added the following paragraph unto the statute:

Chapter 412, *Laws* 1956, Legislature of Mississippi:

"For the purpose of this section, an organization which uses a formula method of apportionment in making income tax returns to this state shall determine its gross receipts from business carried on in Mississippi by applying to total unitary receipts the ratio achieved, or which would be achieved, by such formula and adding to the result of such application any nonunitary Mississippi receipts."

The question is whether *Chapter* 412, *Laws Mississippi Legislature* 1956, as applied to appellant violates the commerce, due process and equal protection clauses of the Constitution of the United States.

II.

ARGUMENT

POINT 1.

THE INCIDENCE OF THE MISSISSIPPI CORPORATE FRANCHISE TAX IS UPON THE PROTECTION OF CORPORATE EXISTENCE AFFORDED BY THE LAWS OF THE STATE

The Mississippi Corporate Franchise Tax is an exaction by the state for the protection afforded by its laws.

Section 9314, *Mississippi Code of* 1942, *Recompiled*:

". . . It being the purpose of this section to require the payment of a tax by all organizations not organiz-

ed under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the State."

Southern Package Corporation v. State Tax Commission, 195 Miss. 864, 872, 15 So. (2d) 436;

Stone v. Interstate Natural Gas Co., (CCA 5th), 103 Fed. (2d) 544, 548, affirmed in 308 U. S. 522.

Such exactions do not violate the commerce clause of the United States Constitution.

Memphis Natural Gas Company v. Stone, 335 U. S. 80.

POINT 2.

ONE ATTACKING AN APPORTIONMENT FORMULA MUST SHOW BY CLEAR PROOF THAT EXTRA-TERRITORIAL VALUES ARE BEING TAXED

The distinct burden is on one who attacks a formula of apportionment of showing by clear and cogent evidence that it results in extra-territorial values being taxed.

Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission, 266 U. S. 271, 282;

Norfolk & Western Railway Co. v. State of North Carolina, ex rel A. J. Maxwell, 297 U. S. 682, 688;

Butler Bros. v. McColgan, 315 U. S. 501, 507;

Railway Express Agency v. Virginia, 358 U. S. 434, 436, 444.

Appellant did not attempt to show that the formula in its actual application taxed extra-territorial values but

contented itself with showing that one factor in the formula had been increased in value eight times. As a matter of fact the formula in this case, as applied to appellant, does not tax extra-territorial values (see Appendix).

There is nothing to show from the proof made by the appellant that multiple taxation is present.

Northwestern States Portland Cement Co. v. Minnesota, 358 U. S. 450, 462.

It is respectfully submitted that the validity of an apportionment formula is tested by its overall result rather than by the value of one of its component factors.

Alpha Portland Cement Co. v. Commonwealth, 139 NE 158, 164:

> ". . . It seems to us that the question in this connection is not whether a subsidiary percentage standing alone may impinge upon property outside the commonwealth, but whether the use of all of the percentages makes the final result a tax which violates constitutional guarantees. The several percentages are not taxes levied upon the terms employed. They are used in combination to ascertain a sum which in amount as applied to all corporations may be reasonable. . ."

Of course, the component parts of a formula would have to bear some valid relationship to the subject matter of the tax and certainly it goes without saying that gross receipts bear such a relationship to corporate franchise taxes.

This Court has never held the states to mathematical exactitude in such matters.

Illinois Central Railroad Co. v. Minnesota, 309 U. S. 157, 161;

Mullaney v. Anderson, 342 U. S. 415, 418.

Appellant concedes that it is subject to the Mississippi franchise tax and that the amount of capital employed in the state may be determined by use of the factors of real and tangible personal property owned or used in Mississippi; gross receipts from business carried on in Mississippi, total real and tangible personal property wherever located, and gross receipts from wherever received.

Appellant disputes only the validity of the method of determination of the factor of "gross receipts from business carried on in Mississippi," which is required by the 1956 legislative enactment for those organization using a formula method of apportionment in making income tax returns. (Jurisdictional Statement, page 12).

The ultimate question for decision is not necessarily whether the State of Mississippi is taxing more than its share of appellant's capital but whether appellant has proved that it has done so. The presumption is to the contrary. This burden is on the appellant, who has possession of all of its books and records, and not on the appellee who has none of these.

There is nothing novel about this question. The law has been stated by this Court many times, the leading cases being *Hans Rees' Sons, Inc. v. North Carolina, ex rel Maxwell*, 283 U. S. 123 and *Butler Bros. v. McColgan*, 315 U. S. 501, 507. Appellant having failed to make its proof should fail in the maintenance of its case.

WHEREFORE, premises considered appellee prays that the appeal in this case be dismissed.

Respectfully submitted,

JOHN E. STONE
Attorney for Appellee

APPENDIX "A"

TENNESSEE GAS TRANSMISSION COMPANY
HOUSTON, TEXAS
EQUITY CAPITAL INVESTED IN MISSISSIPPI REAL AND TANGIBLE PERSONAL PROPERTY AT DECEMBER 31, 1955

Equity Capital	
Preferred Stock	$ 97,556,800.00
Common Stock	73,225,425.00
Premium on Capital Stock and Capital Surplus	54,152,268.00
Retained Earnings	38,828,869.00
Total Equity Capital	263,763,362.00
Borrowed Capital	
Long Term Debt	518,388,000.00
Notes Payable to Banks	33,000,000.00
Total Borrowed Capital	551,388,000.00
Total Capital—Equity and Borrowed	815,151,362.00
Ratio Equity Capital to Total Capital	32.36%
Total investment in real and tangible personal property in Mississippi at December 31, 1955	81,531,070.00
Equity capital invested in Mississippi real and tangible personal property at December 31, 1955—32.36% of $81,531,070	$ 26,383,454.00
Capital under the assessment	22,159,288.00
Untaxed equity capital	$ 4,224,166.00

(Figures taken from Exhibit "1", Record 39)

APPENDIX "B"

TENNESSEE GAS TRANSMISSION COMPANY
HOUSTON, TEXAS
EQUITY CAPITAL INVESTED IN MISSISSIPPI REAL AND TANGIBLE PERSONAL PROPERTY AT DECEMBER 31, 1956

Equity Capital	
Preferred Stock	$ 155,950,000.00
Common Stock	73,298,405.00
Premium on Capital Stock and Capital Surplus	54,548,324.00
Retained Earnings	43,660,237.00
Total Equity Capital	$ 483,406,966.00
Borrowed Capital	
Long Term Debt	$ 572,728,000.00
Notes Payable Bank	39,947,000.00
Total Capital Borrowed	$ 612,675,000.00
Total Capital Equity And Borrowed	$1,096,081,966.00
Ratio Equity Capital to Total Capital	44.1032%
Total Investment Real and Personal Property in Mississippi at 12/31/56	$ 83,718,195.77
Equity Capital Invested in Mississippi real and tangible personal property at 12/31/56 44.1032% x $83,718,195.77	$ 36,922,403.31
Capital under the assessment	25,642,500.00
Untaxed equity capital	$ 11,279,903.31

(Figures taken from Exhibit "1", Record 39)

III

CERTIFICATE

I, John E. Stone, attorney for the appellee in this cause, certify that I have this day mailed postage prepaid to:

Honorable F. Cleveland Hendrick, Jr.
1001 Connecticut Avenue, N. W.
Washington 6, D. C.
Honorable John G. Brendel
Post Office Box 2511
Houston, Texas
Honorable C. S. Tindall
Wynn, Hafter, Lake & Tindall
Weinbarg Building
Greenville, Mississippi
Honorable Fred S. Gilbert, Jr.
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

true copies of the above and foregoing Motion

This 29th day of July, 1960.

John E. Stone

John E. Stone
P. O. Box 960
Jackson, Mississippi
Attorney for Appellee